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No. 07-1005

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IN THE

Supreme Court of the United States

INDU GULATI,

Petitioner,

vs.

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF

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There is an undisputed, deep split that shows no sign of abating concerning the jurisdiction of federal courts to review the denial of a continuance by an Immigration Judge (IJ). The Government agrees that an immigrant has a legal right to judicial review of a continuance denial which can be an issue of immense importance that is entirely distinct from the ultimate decision to grant or deny an adjustment of status. But the Government puts the cart before the horse by claiming this case is a poor vehicle, based on speculation about the likely course of Petitioner's case if she were afforded the judicial review to which she is concededly entitled.

I. THE GOVERNMENT ACKNOWLEDGES THE SUBSTANTIAL CIRCUIT CONFLICT ON THE QUESTION PRESENTED AND, CONTRARY TO THE GOVERNMENT, THAT SPLIT SHOWS NO SIGN OF ABATING

The circuits are divided over whether 8 U.S.C. § 1252(a)(2)(B)(ii) precludes judicial review of an IJ's denial of an immigrant's request to continue removal proceedings. The Government acknowledges the conflict, noting that the Seventh, Eighth, and Tenth Circuits have held that Section 1252(a)(2)(B)(ii) "'generally precludes judicial review' of an IJ's discretionary decision to deny a request for a continuance in removal proceedings," while "[t]he majority of circuit courts have reached a contrary conclusion." Opp. at 12-13. The possibility that this conflict "may well resolve itself," *id.* at 15, because in December 2006 the Government began advocating the majority position, is remote, because, unmentioned by the Government, each of the circuits

on the minority side of the split has since expressly reaffirmed its position.

The Seventh Circuit has twice recently reaffirmed that it lacks jurisdiction over denials of a continuance. On December 27, 2007, Petitioner's request for rehearing *en banc*, expressly inviting the court to review its earlier holding on the issue, was denied. Pet. App. 25a-26a. On February 14, 2008, the Seventh Circuit again held that "we have no jurisdiction to review . . . the BIA's affirmance of the denial of a continuance." *Wood v. Mukasey*, --- F.3d ---, 2008 WL 383286, at *3 (7th Cir. 2008). [1]

The Eighth Circuit has also expressly reaffirmed its position. Though a panel of the Eighth Circuit observed in July 2007 that "it may be appropriate" for the court to reconsider its holding that it did not have jurisdiction to review the denial of a continuance, *Ikenokwalu-White v. Gonzales*, 495 F.3d 919, 924 n.2 (8th Cir. 2007), in a later decision the court expressly reaffirmed that Section 1252(a)(2)(B)(ii) "bars review of the IJ's discretionary denial of a motion to continue." *Thiam v. Gonzales*, 496 F.3d 912, 915 (8th Cir. 2007). Notably, the panel in *Thiam* cited *Ikenokwalu-White* but did *not* renew *Ikenokwalu-White*'s suggestion that en banc review might be appropriate.

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[1] There is no reason to believe that the Government's urged *en banc* rehearing on the issue of jurisdiction over continuance denials in *Potdar v. Keisler*, 505 F.3d 680 (7th Cir. 2007), Opp. at 16-17, will fare any better, especially since "a factual question in *Potdar* about whether the motion the IJ denied was actually a motion for a continuance" may prevent the court from even reaching the issue. *Id.* at 16 n.4.

Lastly, the Tenth Circuit has also at least twice reaffirmed its prior position without indicating any need for reconsideration. *E.g.*, *Kechkar v. Gonzales*, 500 F.3d 1080, 1083 (10th Cir. 2007); *Rivas v. Gonzales*, 220 F. App'x 892, 895 (10th Cir. 2007). Thus, fifteen months after the Government announced its new litigating position, it is clear that the split in the circuits remains deep and persistent.

It is equally clear that the question presented arises with extraordinary frequency and is of great importance to the just and uniform administration of the immigration laws. *See* Pet. at 19-21. The necessity for this Court's review is further demonstrated by the Government's concession that the decision below is wrong. Opp. at 14; Pet. at 18-19.

II. THE GOVERNMENT'S CLAIMED VEHICLE PROBLEMS PROVIDE NO REASON TO DENY CERTIORARI

It is at least strange that the Government, in arguing against the grant of certiorari, invites this Court to effectively conduct the appellate review of the continuance denial and then speculate about the ultimate outcome of Petitioner's effort to adjust status. The Court should decline the invitation.

A. The Claim That The Continuance Was Properly Denied

The Government opposes review because it claims that the denial of the continuance was an appropriate exercise of discretion. Opp. at 18. Even assuming this to be relevant, it is far from clear that the Government is right. After entering this country

on December 8, 1997, and applying for a labor certification on April 30, 2001, Petitioner was first under removal proceedings on August 24, 2004. Pet. App. 11a. At Petitioner's first appearance on October 27, 2004, counsel advised the IJ of Petitioner's previously filed labor certification application and her claim of eligibility for adjustment of status under the grandfather provision, 8 U.S.C. § 1255(i) (Section 245(i)). The IJ granted a continuance for further preparation until February 1, 2005.

The IJ's own scheduling issues caused the next appearance to be delayed twice, for a total of four months, first to May 24, 2005 and then to June 3, 2005. Petitioner's counsel's absence from the country led to a further two week delay until June 16, 2005, when the hearing was held. Pet. App. 19a.

This is hardly a pattern of serial delay instigated by Petitioner. And at her second, and final appearance, Petitioner submitted an acknowledgement from the State of California that it had in fact received a labor certification application filed on her behalf. Pet. App. 3a. Her request for a further continuance rested on the fact that during the four years that her initial application had sat unaddressed by the California Workforce Development Agency, her initial employer had gone out of business. *Id.* She sought additional time to arrange for the filing of a new labor certification from her new prospective employer, a practice well within the contemplation of the Section 1255(i) grandfathering provision. *See* p.5, *infra*.

B. The Claim That Her Adjustment Of Status Is Doomed To Failure In Any Event

The Government also urges the Court to deny certiorari on the ground that even if a continuance were granted, Petitioner would be unable to secure adjustment of status to that of lawful permanent resident (LPR). Opp. at 18-19. Again, the Court should decline the invitation.

When Petitioner requested a continuance, she was actively pursuing adjustment of status through two separate routes: via a new labor certification from a Chicago-based employer, Pet. App. 20a, and as the immediate relative of her son, who is married to a U.S. citizen, Pet. App. 18a. Section 245(i) contemplates that an immigrant will be able to make use of both to adjust her status. With regard to a labor certification, an immigrant "who is adjusting status through an employment-based category is not required to work for the [employer] who filed the petition that grandfathered the alien." 8 C.F.R. § 245.10(k). With regard to an immediate relative petition, a grandfathered immigrant "is not limited to seeking adjustment of status solely on the basis of the qualifying . . . application for labor certification." Interoffice Memorandum, William R. Yates, *Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act* at 2, Mar. 9, 2005.[2]

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[2] This memorandum is available at http://www.uscis.gov/files/pressrelease/245iClarification030905.pdf.

Petitioner has continued to pursue both avenues to adjust her status since the Seventh Circuit denied her petition for review, and has made substantial progress on each. Petitioner's son has been granted lawful permanent resident (LPR) status, and intends to sponsor Petitioner as an immediate relative of a citizen as soon as his naturalization proceedings conclude. Congress has placed no numerical limitations on this means of acquiring LPR status. 8 U.S.C. § 1151(b)(2)(A)(i). Petitioner is also seeking a new labor certification through a new employer in Chicago.

Contrary to the Government, Opp. at 19, Petitioner did not waive or concede her right to grandfathered status under Section 245(i). *See* Application Stay Order of Voluntary Departure filed with this Court on January 8, 2008, at 10 n.3. Although dictum in the Seventh Circuit's order suggested that the IJ ruled against Petitioner on the issue of 245(i) eligibility and that she "waive[d] any challenge to that aspect of the IJ's ruling," Pet. App. 6a-7a, the hearing transcript makes clear that the IJ never decided the issue. At the hearing, before issuing his oral decision, the IJ stated: "I'm not deciding whether she has 245(i) eligibility or not . . . [A]t this time, I'm not even deciding the 245(i) eligibility issue." Pet. App. 20a-21a. In the court below, both parties recognized the issue had not been decided. *See* Pet.'s C.A. Br. 6; Resp.'s C.A. Br. 5.

The IJ's later statement that "this court does not find on the basic facts presented that [Petitioner] is even 245(i) eligible," Pet. App. 14a, is simply another indication that the IJ made *no* decision regarding the

eligibility issue. Thus, the IJ immediately went on to address the possibility that Petitioner may be 245(i) eligible: "Even if the respondent is 245(i) eligible, no [new] labor certification has been filed on her behalf and no evidence has been presented to show that it is prima facie approvable." *Id.* The IJ's statement simply shows that as a result of his own failure to continue the Petitioner's removal proceedings, he lacked facts necessary to determine Petitioner's section 245(i) eligibility.

Finally, Petitioner *did* challenge this aspect of the IJ's opinion before the circuit court. In her original merits brief, for example, Petitioner argued that she "became eligible as of April 30, 2001 to apply for adjustment of status to legal permanent residency upon approval of her application for labor certification." Pet. C.A. Br. 11.

C. The Claim That Federal Courts Lack Authority To Stay An Order Of Voluntary Departure

The Government's final argument for denying certiorari—that federal courts lack authority to stay an order of voluntary departure—is not credible or persuasive for several reasons.

First, the Government's position is at odds with its own prior conduct in this very case in filing a "statement of non-opposition" to a stay of voluntary departure in the Seventh Circuit on the 60th and final day of Petitioner's original voluntary departure period. Opp. at 9; No. 06-322, Sept. 29, 2006 Docket entry (7th Cir.). The Government thus contradicted its position that an order of voluntary departure may

never extend for more than 60 days, *see* Opp. at 20-21, and its assertion that "the ability to extend an initial period of voluntary departure is vested exclusively in the Executive Branch." *Id.* at 21.

The Government attempts to explain its action as compelled by Seventh Circuit precedent recognizing the power of courts to stay voluntary departure. Opp. at 20 n.6. But that power does not entitle one to a stay without making the required showing, and the Government in acquiescing expressly noted its view that no such showing had been made. *Id.* at 9. *See Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004) ("the entitlement to extra time for voluntary departure must be *demonstrated* rather than assumed") (emphasis in original); *accord Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999). Certainly, the Government could have opposed the stay in the court below, but instead it invited the Seventh Circuit to act in a manner that it now says exceeded its jurisdiction.

Second, there is no sound basis for the view that the courts of appeals lack jurisdiction to stay voluntary departure periods. That position has been rejected by eight of the nine circuits to address it,[3]

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[3] The Government principally relies on a divided decision of the Fourth Circuit in *Ngarurih v. Ashcroft*, 371 F.3d 182 (2004), in which the question at issue here was not resolved as part of the holding of the case. The issue there was whether a court of appeals could reinstate a period of voluntary departure that had already expired, not whether the court could toll an unexpired period of voluntary departure. *See id.* at 191. The Government acknowledges that the reinstatement of a voluntary departure

and is unsupported by the plain language of IIRIRA. Further, it conflicts with longstanding principles of construing ambiguities in immigration statutes in favor of the immigrant, *INS v. St. Cyr,* 533 U.S. 289, 298 (2001), and requiring a clear Congressional command for jurisdiction stripping, *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942).

The grant or denial of a stay pending appeal is a customary part of the judicial function. *See* FED. R. APP. P. 8(a)-(b); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("power to stay proceedings is incidental to the power inherent in every court to control the disposition of" cases before it).

IIRIRA precludes appellate review of decisions to grant, 8 U.S.C. § 1252(a)(2)(B)(i),[4] or deny, § 1229c(f),[5] voluntary departure. Thus, courts may not review the executive branch judgment about whether an immigrant met the statutory qualifications for a voluntary departure. It does not limit courts' power to toll the voluntary departure period in order to provide time to conduct appellate review of any issues over which they do have

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period is a substantially different issue than the power to stay one that has not yet run. Opp. at 23 & n.9.

[4] "Notwithstanding any other provision of law, . . . no court shall have jurisdiction to review—(i) any judgment regarding the *granting* of [voluntary departure]." 8 U.S.C § 1252(a)(2)(B) (emphasis added).

[5] "No court shall have jurisdiction over an appeal from *denial* of a request for an order of voluntary departure . . . nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." 8 U.S.C. § 1229c(f) (emphasis added).

jurisdiction. As Judge Higginbotham noted: "[courts] issue a stay [of voluntary departure] to consider an alien's challenge to the executive's determination of removability, not its determination with respect to voluntary departure." *Vidal v. Gonzales*, 491 F.3d 250, 253 (5th Cir. 2007).

The Government also argues that 8 C.F.R. § 1240.26(f), which grants three particular officials—and only them—power to extend the time to depart voluntarily, supports their claim that authority to stay voluntary departure has been stripped from the federal appellate courts. Opp. at 22. Apart from the fact that no regulation could resolve the issue of jurisdiction one way or the other, this regulation on its face describes the authority that exists within the executive branch, and does not purport to address authority of courts. Judicial authority to issue stays of voluntary departure comes from 8 U.S.C. § 1252(a)(1): "Judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28," which provides "the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition." 28 U.S.C. § 2349(b); *see Vidal*, 491 F.3d at 253.

Finally, the Court need not address this argument in order to reach the question presented here. A federal court of appeals and a Justice of this Court have already expressly decided this issue in the context of this case. These decisions are clearly sufficient to establish that this argument has been rejected as law of the case. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). The Government's very weak

effort to call jurisdiction into doubt should not distract the Court. The essence of the Government's argument is that meaningful appellate review in an Article III court is unavailable once an order of voluntary departure has been entered, and further, that this Court must view as "off limits" any issue arising in a case where the petitioner was previously granted a stay of voluntary departure. Absent clear statutory language precluding the courts from tolling an order of voluntary departure—which is wholly lacking—this Court should not presume that Congress intended this bizarre and possibly unconstitutional result. *See St. Cyr*, 533 U.S. at 298.[6]

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[6] The question presented by *Dada v. Mukasey*, No. 06-1181 (argued Jan. 8, 2008), is distinct from the issue raised by the Government now. *Dada* concerns whether "the filing of a motion to reopen removal proceedings" before the Attorney General "automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." No. 06-1181, Sept. 25, 2007 Docket entry (U.S.). Here, the Government's argument concerns the federal courts' authority to toll an order of voluntary departure. Consequently, there is no reason to hold this petition for *Dada*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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